

NOT TO BE PUBLISHED

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Modoc)

THE PEOPLE,

Plaintiff and Respondent,

v.

ELVIS LEE WALLIS,

Defendant and Appellant.

C074529

(Super. Ct. No. F13173)

This is an appeal pursuant to *People v. Wende* (1979) 25 Cal.3d 436 (*Wende*). We affirm the judgment as modified.

BACKGROUND

In April 2013, defendant Elvis Lee Wallis and his female friend drove up to a liquor store and invited M.M. and her female friend, A.U., to defendant's house to drink. They accepted. At some point, A.U. left the house. The next morning, M.M. woke up and found her panties down and semen on her inner thighs. She remembered nothing

from the night before except that her ponytail had been pulled. She drank three shots of whiskey that night.

Defendant entered a no contest plea to inducing or engaging in sexual acts with another person by means of fraud (Pen. Code, § 266c)¹ in exchange for dismissal of two counts of rape of an unconscious person (§ 261, subd. (a)(4)), with a restitution waiver pursuant to *People v. Harvey* (1979) 25 Cal.3d 754, as well as dismissal of another unrelated case and the People's agreement not to add a strike prior. The trial court sentenced defendant to state prison for the upper term of four years. Defendant appeals.

DISCUSSION

We appointed counsel to represent defendant on appeal. Counsel filed an opening brief that sets forth the facts of the case and requests this court to review the record and determine whether there are any arguable issues on appeal. (*Wende, supra*, 25 Cal.3d 436.) Defendant was advised by counsel of the right to file a supplemental brief within 30 days of the date of filing of the opening brief. More than 30 days have elapsed, and we have received no communication from defendant.

We note a conflict in the record with respect to the amount of the restitution fine and the corresponding parole revocation restitution fine (parole fine). The trial court orally imposed a \$264 restitution fine and a \$280 parole fine. The abstract of judgment as well as the minutes of the proceeding erroneously reflect that the court imposed \$264 for both fines. The fines were not discussed at sentencing. At the time defendant committed his offense, the minimum restitution fine was \$280. (Section 1202.4, subd. (b)(1).)

The restitution fine, although including a minimum amount, is discretionary in that it permits the trial court to decline to impose it for "compelling and extraordinary

¹ Further undesignated statutory references are to the Penal Code.

reasons.” (§ 1202.4, subd. (b).) Here, the trial court imposed the fine in the first instance, but the resulting amount was (slightly) below the mandatory minimum. Because the trial court has exercised its discretion but the resulting fine is unauthorized, we may correct the fine on appeal. (See *People v. Walz* (2008) 160 Cal.App.4th 1364, 1369-1370 [correcting a fine where the dollar amount was lower than the statute required]; cf. *People v. Zackery* (2007) 147 Cal.App.4th 380, 388-389.)

The parole fine is required to be the same amount as the restitution fine. (§ 1202.45, subd. (a).) Accordingly, upon deciding to impose *any* restitution fine, the trial court was required by statute to impose a minimum of \$280 for both fines.

We modify the judgment to reflect the amount of \$280 for both fines, and order that the abstract of judgment be amended accordingly.

Having undertaken an examination of the entire record, we find no arguable error that would result in a disposition more favorable to defendant.

DISPOSITION

The judgment is modified to impose a \$280 restitution fine and a \$280 parole revocation restitution fine. As modified, the judgment is affirmed. We direct that the abstract of judgment be amended accordingly, and that a certified copy be sent to the Department of Corrections and Rehabilitation.

DUARTE, J.

We concur:

BLEASE, Acting P. J.

MURRAY, J.